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No. 85-

IN THE

Supreme Court of the United States

October Term, 1985

ROBERT HEISER, *Petitioner*

v.

RUBY PLESS HEISER, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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QUESTION PRESENTED

1. Did the North Carolina courts denial of Petitioner's right of cause of action to collaterally attack a fraudulently procured prior divorce judgment violate his constitutional rights under the due process and equal protection guarantees of the Fifth and Fourteenth Amendments?

PARTIES TO THE PROCEEDING

The parties to the proceeding are as follows: The plaintiff-appellant (Petitioner here) is Robert Heiser. The defendant-appellee (Respondent here) is Ruby Pless Heiser.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petitioner, Robert Heiser, respectfully prays that a writ of certiorari issue to review the denial of the petition for discretionary review of the Supreme Court of North Carolina entered in this case on March 11, 1985.

OPINIONS BELOW

The denial of the petition for discretionary review of the Supreme Court of North Carolina is reported at _____ N.C. _____, _____ S.E. 2d. _____ (1985). The opinion of the North Carolina Court of Appeals is reported at 71 N.C. App. 223, 321 S.E. 2d. 479 (1984).

JURISDICTION

The denial of the petition for discretionary review of the Supreme Court of North Carolina was entered on March 11, 1985 and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides that, "no person shall be. . . deprived of life, liberty, or property, without due process of law . . ."

The Fourteenth Amendment provides that, "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On April 14, 1951, the Respondent Wife married her first husband, Harry Pless. On December 9, 1973, they signed a Deed of Separation memorializing these dates, and establishing their mutual residence in Haywood County.

On March 5, 1974, she filed a verified complaint for divorce in Buncombe County based on a one-year separation from Pless, alleging a separation date of May 12, 1972. She alleged Pless was a resident of Buncombe County. After summons was returned "not to be found" in Buncombe County she obtained service by publication in a Buncombe County newspaper. A judgment of divorce was granted by the Buncombe County District Court on April 24, 1974.

On July 12, 1974, the Wife married Petitioner Heiser.

Husband Pless then filed a complaint in Haywood County District Court seeking a divorce from his Wife, alleging the same facts and dates set forth in their Deed of Separation. The Wife filed answer on January 3, 1975, after her marriage to Petitioner and without his knowledge or participation, admitting both separation from Husband Pless on December 9, 1973 and that he was a resident of Haywood County. A judgment of absolute divorce was filed in the Haywood County District Court on January 6, 1975.

During her purported marriage to Petitioner, the Wife induced him to convey valuable real property directly to her and subsequently commenced a divorce from bed and board suit against him. During the course of this proceeding, Petitioner learned the true facts surrounding the two separate divorce proceedings between the Wife and her Husband Pless. Petitioner sought to attack the validity of the Wife's first purported divorce in this proceeding, but this was disallowed, although the jury found she was not entitled to a divorce from bed and board. The Wife then filed a suit for absolute divorce from Petitioner. Petitioner sought to attack the validity of the marriage as a defense in this divorce suit, but the defense was disallowed. Petitioner then filed an independent action in the Buncombe County District Court seeking an annulment on the grounds that his marriage to the Wife was unlawful under North Carolina law because the purported divorce decree granted by the Buncombe County District Court was obtained by fraud upon the Court and the Wife was still lawfully married to a third person on the date of her purported marriage to Petitioner.

The Wife filed answer to the annulment action containing a general denial and a motion to dismiss under Rule 12(b) of the Rules of Civil Procedure. The District Court granted Summary Judgment in favor of the Wife and dismissed the annulment action on October 25, 1983. Petitioner gave notice and duly perfected his appeal.

Petitioner raised two issues on appeal. First, could Petitioner collaterally attack a divorce decree, for the purpose of nullifying the decree as it affected his marriage, by offering evidence to show that the Respondent submitted a fraudulent affidavit to justify service by publication in her divorce action, which publication provided the jurisdictional basis for the decree? Second, Petitioner raised the issue now being addressed: Does denial of a collateral attack to the divorce, in which jurisdiction was obtained through fraud, constitute a denial to the Petitioner of due process or equal protection of the law?

On November 6, 1984, without permitting oral argument, the North Carolina Court of Appeals filed its decision affirming the Summary Judgment granted in favor of the Wife. The Court held that if the finding in the divorce decree from her former husband was in all respects regular on its face, the Petitioner "does not have standing to attack collaterally, the divorce decree * * * because he is a stranger to [it] who is not prejudiced as to some preexisting right by [it]." Heiser v. Heiser, 71 N.C. App. 223, 321 S.E. 2d. 479 (1984). The Appellate Court did not address the constitutional issue in its opinion.

Petitioner timely perfected appeal to the Supreme Court of North Carolina and again asserted the constitutional issue now being presented to this Court. The Supreme Court of North Carolina entered a denial of the petition for discretionary review on March 11, 1985.

REASONS FOR GRANTING THE WRIT

The Subject Matter of this Petition for Certiorari is of Significant Public Interest. Heiser is the first appellate North Carolina decision to squarely address the validity of a third party attack on a fraudulently obtained divorce where the third party had no knowledge of the fraud. In Heiser, the fraud went to the very jurisdictional authority of the court to enter a valid divorce. The Court of Appeals, by affirming the summary judgment entered by the trial court, closed its eyes to flagrant fraud and abuse of its process and effectively denied due process and equal protection to the Petitioner. This issue is of significant public interest because it:

I. Countenances an intentional, clear, and blatant fraud upon the court, a fraud that visibly appears on the face of public judicial documents, and;

II. Violates the Petitioner's due process and equal protection constitutional rights under the Fifth and Fourteenth Amendment by denying him right of access to the courts to attack this obvious fraud and gain redress for his injury.

This court has repeatedly emphasized that "the Due Process clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged". Logan v. Zimmerman Brush Co., 455 U.S. 422, 434, 102 S. Ct. 1148, 1156, 71 L. Ed.2d. 265 (1982). This Court has recognized that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause. Mullane v. Hanover Bank and Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950). The hallmark of property is an individual entitlement grounded in state law, which cannot be removed except "for cause." Logan v. Zimmerman Brush Co., 455 U.S. at 431, 102 S. Ct. at 1155.

North Carolina General Statutes, Section 51-3, provides that "all marriages . . . between persons either of whom has a husband or wife living at the time of such marriage . . . shall be void." Public policy precludes citizens of the state from avoiding the legislature's judgment on the question of divorce. North Carolina citizens are to endure a one year period of separation to lessen the likelihood of an ill considered divorce and hasty remarriage such as the one in question.

When faced with the issue of a fraudulently procurred divorce through service of summons based on a false and fraudulent affidavit, the North Carolina courts have consistently, except for Heiser, allowed redress through the court system and set aside the prior judgment on the grounds that the court acquired no jurisdiction over the party upon no process had been served. The subsequent marriage was thus annulled, a nullity, void ab initio, etc.

The clear arbitrariness and unfairness of the decision denying this Petitioner right of access to the court system is best evidenced by noting that while under the same existing factual conditions, North Carolina law will not allow Petitioner Heiser to collaterally attack a prior divorce judgment which is regular on the face of its record, it will allow:

(1) A collateral attack by a subsequent spouse to a divorce decree irregular on the face of the record. [1] Pridgen v. Pridgen, 203, N.C. 533, 166 S.E. 591 (1932).

(2) A collateral attack by a former spouse to a divorce decree that is regular on the face of the record. Donnell V. Howell, 257 N.C. 175, 125 S.E. 2d. 488 (1962).

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[1] The leading North Carolina case on collateral attack of a divorce decree by a subsequent spouse cited Pridgen as direct authority for the above mentioned proposition. See Carpenter v.Carpenter, 244 N.C. 286, 93 S.E. 2d. 617 (1956).

(3) An attack by the state upon the divorce decree.[2]

The law enunciated in Heiser results in an arbitrary and unfair result. The States goal and purpose to both provide redress to wronged individuals and uphold the state policy against fraudulently procurred divorces is neither furthered nor rationally related to the holding in Heiser. Denying Petitioner the right to collaterally attack the prior divorce judgment is constitutionally repugnant because it denies this legal right and policy which it affords to others or to the State itself.

The denial of access to the courts also violates Petitioner's Equal Protection rights granted under the Fourteenth Admendment. The law put forth in Heiser establishes two classifications, one is explicit, the other is not. First, the court explicitly catagorizes claimants into two distinct groups; subsequent spouses and former spouses. It then affords disparate treatment by permitting former spouses to collaterally attack a prior divorce judgment that is regular on the face of the record while prohibiting subsequent spouses from such attacks. Second, the court implicitly creates another classification, that of two groups of claims which are accorded disparate treatment. One permits collateral attacks on fraudulent decrees if the fraud appears on the face of the record but the other denies such attacks if they do not. See concurring opinion by Justice Blackmun, Logan v. Zimmerman Brush Co., 455 U.S. at 438, 102 S. Ct. at 1159 (Justices Brennan, Marshall and O'Connor joining).

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[2] It would also appear that in a criminal prosecution for bigamy, adultery or fornication, the State would have the right to impeach the validity of a decree divorcing a defendant from a former spouse when that decree is relied upon by a criminal defendant as a defense. State v. Herron, 175 N.C. 754 (1918); State v. Williams, 224 N.C. 183, 29 S.E. 2d 744 (1944), affirmed Williams v. North Carolina, 325 U.S. 226 (1945).

This court has consistently required legislatures and courts to classify personal rights in a manner rationally related to legitimate governmental objectives. Logan, Id. Heiser falls short of this Equal Protection analysis because it results in an irrational result and is inconsistent with the State's statutory method of providing redress to injured persons and upholding the State's policy against fraudulent procurement of divorces.

CONCLUSION

The Writ of Certiorari raises a clear error on an issue of significant public interest. As such, it should be granted.

Respectfully submitted,

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Appendix A

No. 714P84 Twenty-Eighth District

SUPREME COURT OF NORTH CAROLINA

****

ROBERT HEISER v. RUBY PLESS HEISER	JUDGMENT DISMISSING APPEAL ON MOTION OF DEFENDANT AND DENYING PETITION FOR DISCRETIONARY REVIEW (8328DC1269)

****

Upon consideration of the Plaintiff's notice of appeal from the North Carolina Court of Appeals, filed in this matter pursuant to G.S. 7A-30, and the Defendant's motion to dismiss the appeal for lack of substantial constitutional question and upon consideration of the Plaintiff's petition for discretionary review of the decision of the North Carolina Court of Appeals, pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals: Defendant's motion to dismiss the appeal is

"Allowed by order of the Court in conference, this the 27th day of February 1985.

s / Vaughn, J.

For the Court"

Plaintiff's petition for discretionary review is

"Denied by order of the Court in conference, this the 27th day of February 1985.

s / Vaughn, J.

For the Court"

Therefore, it is considered and adjudged further that Plaintiff's do pay the sum of Nine and no/100 Dollars ($9.00) and that execution issue therefor.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 11th day of March 1985.

J. GREGORY WALLACE
Clerk of the Supreme Court

Copy to:
North Carolina Court of Appeals
Holt, Haire & Bridgers, Attorneys at Law
Mr. John E. Shackelford, Attorney at Law

Appendix B

No. 8328DC1269

NORTH CAROLINA COURT OF APPEALS

Filed: 6 November 1984

ROBERT HEISER

v.

RUBY PLESS HEISER

Buncombe County
No. 83CvD2157

Appeal by plaintiff from Fowler, Judge. Judgment entered 25 October 1983 in District Court, Buncombe County. Heard in the Court of Appeals 24 September 1984.

Plaintiff-husband appeals from a judgment dismissing his action for annulment of his marriage to defendant-wife.

Holt, Haire & Bridgers, P.A., by Ben Oshel Bridgers, for plaintiff appellant.

Riddle, Shackelford & Hyler, P.A., by John E. Shackelford, for defendant appellee.

WHICHARD, Judge.

I.

The complaint prays that plaintiff-husband be granted an annulment of his "purported marriage" to defendant-wife on the following grounds: Plaintiff-husband and defendant-wife entered into a ceremony of marriage on 12 July 1974. Plaintiff-husband entered the marriage in good faith and without notice or knowledge that defendant-wife had obtained a fraudulent divorce from her prior husband. Defendant-wife

obtained the prior divorce by fraud in that she represented that her then husband resided in Buncombe County, the venue of that action, when in fact to her knowledge he resided in Haywood County. The Buncombe County court relied upon defendant wife's false representation and was induced to assert jurisdiction over her then husband upon service by publication, when in fact the court could not obtain service by publication under the true facts and circumstances. Defendant-wife thus was still married to her prior husband when she purported to marry plaintiff-husband. Plaintiff-husband therefore is entitled to an annulment of the purported marriage under G.S. 51-3, which provides that a marriage between persons either of whom has a husband or wife living at the time is void.

Defendant-wife pled as a defense that "[t]his is an action to set aside a divorce and is not brought by the parties to said divorce and, therefore, does not state a claim upon which relief should be granted and should be dismissed . . ." The trial court found that "the divorce judgment entered [in defendant-wife's Buncombe County action against her prior husband] . . . is in all aspects regular on its face; that this is an action brought not by the parties to said . . . action and that therefore this case should be dismissed . . ."

From a judgment dismissing the claim, plaintiff-husband appeals.

II.

Plaintiff-husband did not except to the finding that the divorce judgment in defendant-wife's prior action against her former husband was in all respects regular on its face. He does not contend nor does the record indicate that the judgment on its face was irregular in any respect. He thus "does not have standing to attack collaterally the divorce decree . . . because he is a stranger to [it] who is not prejudiced as to some pre-existing right by [it]." Maxwell v. Woods, 47 N.C.App. 495, 497, 267 S.E.2d 516, 517, disc. rev. denied, 301 N.C.

236, 283 S.E.2d 132 (1980). See also Carpenter v. Carpenter, 244 N.C. 286, 93 S.E.2d 617 (1956) (since plaintiff-husband can rely upon the prior divorce decree, sounder view is to require him to do so rather than permit him to attack it at his election, depending on the fortunes or misfortunes of the marriage); 46 Am.Jur.2d, Judgments § 663, p. 819 (''a collateral attack may not be made upon a judgment where the absence of jurisdiction does not appear upon the record''); 1 Lee, North Carolina Family Law § 92 (4th ed. 1979).

Pursuant to the foregoing authorities the trial court ruled correctly; the judgment accordingly is

Affirmed.

Chief Judge VAUGHN and Judge JOHNSON concur.

Appendix C

STATE OF NORTH CAROLINA — IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
COUNT OF BUNCOMBE — FILE #83 CV 2157

ROBERT HEISER,
Plaintiff,

vs. — JUDGMENT

RUBY PLESS HEISER,
Defendant.

THIS CAUSE coming on to be heard upon the Motion of the defendant for summary judgment and the defendant having offered the Complaint of the plaintiff together with Exhibits A, B, and C attached thereto and the Court having examined said attachments and finds that the divorce judgment entered therein is in all respects regular on its face; that this is an action brought not by the parties to said and former action and that therefore this case should be dismissed.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the plaintiff's claim for relief by and the same is hereby dismissed and the defendant is taxed with the costs.

THIS, the 25 day of Oct., 1983.

JUDGE FOWLER